91-465

Supreme Court, U.S.
FILED
SEP 16 1991
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ACADEMY LIFE INSURANCE COMPANY, *Petitioner*,

v.

GEORGE W. GUILL, *Respondent*.

ACADEMY LIFE INSURANCE COMPANY, *Petitioner*,

v.

NORRIS O. WHITLEY, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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September 11, 1991.

QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fifth Amendment and Fourteenth Amendment to the Constitution of the United States is violated by the imposition of punitive damages where the amount of such damages is not determined with mandatory consideration by the fact finder of the character and degree of the wrong as shown by the evidence and necessity of preventing similar wrong?

2. Whether the Due Process Clause of the Fifth Amendment and Fourteenth Amendment to the Constitution of the United States is violated by the imposition of punitive damages where the amount of such damages is not made subject on post-trial and appellate review to the constraint of standards comparable to those found sufficiently definite and meaningful in *Pacific Mutual Life Ins. Co. vs. Haslip*, 499 U.S. _____, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991)?

LIST OF PARTIES AND RULE 29.1 LIST

The names of all parties to the proceedings in the court below are contained in the caption of this petition.

The petitioner, Academy Life Insurance Company, is a wholly owned subsidiary of Academy Insurance Group, Inc.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The petitioner, Academy Life Insurance Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in these cases on June 19, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unpublished. It is reprinted in the Appendix hereto, p. 1a, *infra*.

The Order of the United States District Court for the District of South Carolina, Columbia Division, (Henderson, D.J.), denying petitioner's post-trial motions is not reported. It is reprinted in the Appendix hereto, p. 9a, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit affirming the judgments of the District Court was entered June 19, 1991, and this Petition for a Writ of Certiorari is filed within ninety (90) days thereof. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondents are former insurance agents of the petitioner whose agent, general agent and managing general agent agreements with petitioner were terminated in July, 1986. Respondents instituted separate actions in the state court of South Carolina against petitioner and others,[1] seeking recovery of actual and punitive damages. The complaints alleged, *inter alia*, causes of action for breach of the agent, general agent and managing general agent agreements by failure of petitioner to pay respondents commissions due thereunder and for conversion of sums due under the agreements. The actions were separately removed to the United States District Court for the District of South Carolina, Columbia Division, pursuant to 28 U.S.C. §1441(a) based on diversity of citizenship of the parties (28 U.S.C. §1332).

The two actions were consolidated for jury trial. At the consolidated trial, the District Court directed a verdict against petitioner in each of the cases for breach of contract, denied a motion of petitioner for directed verdict on the conversion claims, and submitted to the jury the issue of the amount of actual damages on the breach of contract causes of action and the issues of liability and damages, actual and punitive, on the conversion causes of action.

With respect to punitive damages, the District Court instructed the jury as follows:

> "The plaintiffs are also seeking punitive damages in their conversion cause of action.
>
> "The law permits the jury, under certain circumstances, to award punitive damages in order to punish a wrongdoer for some extraordinary misconduct, and

[1] The complaints as initially filed included Academy Insurance Group, Inc., Pension Insurance Group of America, Pension Life Insurance Company of America and Academy Services as party defendants. By consent order entered December 10, 1987, Pension Insurance Group of America [Pension Insurance Group of America, Inc.] was granted summary judgment in both actions. The actions were subsequently dismissed, without prejudice, as to the remaining defendants other than petitioner by stipulation filed August 19, 1988.

to serve as a warning not to engage in such conduct in the future.

"Thus, if you find that the plaintiffs have shown by a preponderance of the evidence, that the defendant converted the plaintiffs' money with malice, ill will, a conscious indifference to the rights of others, or a reckless disregard for the right of others, you may award the plaintiffs punitive damages.

"If you so find, it becomes your right to award punitive damages in such an amount as you unanimously agree to be proper in light of the character of the wrong committed, the punishment which should be applied, and the ability of the defendant to pay."

The jury returned a verdict for respondent Guill in the sum of $51,449 actual damages and $250,000 punitive damages, for a total of $301,449, and a verdict for respondent Whitley in the sum of $25,390 actual damages and $250,000 punitive damages, for a total of $275,390. Judgments were thereupon entered on the verdicts on June 8, 1989.

Petitioner timely moved for judgment notwithstanding the verdicts on the conversion causes of action and consequent punitive damages, and alternatively moved for new trial on grounds which included that the verdicts were excessive as a matter of law to the extent of the punitive damages awards; that the verdicts were excessive and appeared to have been rendered under the influence of passion, prejudice or other improper consideration; and that the verdict amounts were excessive as contrary to the weight of the evidence and unduly liberal. In the further alternative, petitioner moved for a new trial absent remittitur of a reasonable amount on the grounds of excessiveness of the verdicts, asserting that the punitive damages awards were contrary to law and that the amounts of the verdicts were contrary to the clear weight of the evidence and unduly liberal. In reply to respondents' contention that the amounts of the punitive damage awards were jus-

tified in view of the substantial discretion afforded a jury under South Carolina law with respect to punitive damages, petitioner contended that leaving the computation of punitive damages to the discretion of the jury without adequate standards for determining the amounts to be assessed as permitted under the laws of South Carolina and applied in the instant cases failed to satisfy due process and that the awards of punitive damages were in violation of the Due Process Clause of the Fifth Amendment and Fourteenth Amendment to the Constitution of the United States.

The District Court thereafter issued its consolidated Order entered July 25, 1989 (App. p. 9a, *infra*) denying petitioner's post-trial motions, concluding with respect to the punitive damages awards as follows:

> "The defendant also contends that the punitive damages award was excessive and the Court should grant a new trial on this basis. In a diversity action, state substantive law determines the circumstances justifying punitive damages and federal law governs the trial court's review of the size of the jury verdict. *Shamblin's Ready Mix, Inc. v. Eaton Corp.*, 873 F.2d 736, 738 (4th Cir. 1989) (citing *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649 (1977). Under South Carolina law, the assessment of punitive damages requires consideration of 'the character of the tort committed, the punishment which should be meted out therefor, and the ability of the defendant to pay the damages awarded.' *Albertini v. Veal*, 292 S.C. 562, 357 S.E.2d 716, 718 (Ct. App. 1987). Applying those factors here, the Court concludes the punitive damages awards are not excessive."

Petitioner thereafter appealed the judgments and denial of its post-trial motions to the United States Court of Appeals for the Fourth Circuit, contending on the appeal that the conversion verdicts were not supported by substantial evidence and also that the verdicts for punitive damages were excessive and were in violation of the Due Process Clause, having particular reference to the absence

of any clear and objective standards or guidelines which governed the jury's determination of the amount of punitive damages. During the pendency of the appeal, this Court rendered its decision in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. _____, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). On June 19, 1991, the United States Court of Appeals for the Fourth Circuit affirmed the judgments in both of the instant cases (App. p. 1a, *infra*). The opinion of the Court of Appeals addresses the due process issue in light of the *Haslip* case and deals with the issue as follows:

> "Academy also appeals the award of punitive damages, which was more than four times the award of compensatory damages. Academy maintains that the award is excessive and a violation of its due process rights.
>
> The Supreme Court has recently foreclosed Academy's due process claim. *Pacific Mutual Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991). The award is not so large that it is excessive as a matter of law. South Carolina courts have upheld punitive damage awards as large as ten times the actual damage award. *See Robertson v. State Farm Mut. Auto. Ins. Co.*, 464 F. Supp. 876, 879 (D.S.C. 1979) (compendium of punitive damages awards). Consequently, we will not disturb the punitive damage award in this case."

REASONS FOR GRANTING THE WRIT

I.

The opinion of the Court of Appeals misinterprets and misapplies this Court's prior decision in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. _____ , 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), and conflicts in principle with that decision.

The court below misinterpreted and misapplied the *Haslip* case in concluding that it foreclosed petitioner's due process claim. In *Haslip*, this Court recognized the constitutional limitation of due process upon discretionary

assessment of the amount of punitive damages, requiring for satisfaction of due process that the discretion be exercised "within reasonable constraints." (111 S.Ct. at 1044). The constraints which this Court found acceptable constrained the fact finder's discretion to "deterrence and retribution, the state policy concerns sought to be advanced" (111 S.Ct. at 1044), under instructions which had been given to the jury that if the jury were to award punitive damages, they "*must* take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong" (111 S.Ct. at 1044) (emphasis supplied). The constraints further included post-trial and appellate review which applied "detailed substantive standards" that had been developed by the Supreme Court of Alabama for evaluating punitive awards and which took into account:

> ". . . (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the 'financial position' of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant of the same conduct, these also to be taken in mitigation." (111 S.Ct. at 1045)

It was the application of the foregoing enumerated standards pursuant to the Alabama protective procedure which this Court in *Haslip* concluded imposed a "sufficiently definite and meaningful" constraint on the discretion of the jury in awarding punitive damages (111 S.Ct. at 1045).

In the instant cases, the jury was not instructed in mandatory terms that if punitive damages were to be awarded, they must take into consideration the character and degree of the wrong as shown by the evidence and necessity of preventing similar wrong, as in the *Haslip* case. Further, no post-trial or appellate review consistent with the *Haslip* emphasis upon "definite and meaningful" standards was provided or exercised. The District Court recited only its consideration of the very same vague and indefinite factors that call for the constraint of definite and meaningful standards. The Court of Appeals determined the due process issue with equal indifference to any definite standards despite this Court's decision in the *Haslip* case. Moreover, it determined the matter of excessiveness of the punitive damages awards only by a comparison of the size of the verdicts with verdicts in other cases collected in *Robertson v. State Farm Mut. Auto. Ins. Co.*, 464 F.Supp. 876, 879 (D.S.C. 1979) (a case involving bad faith refusal to pay first party insurance benefits), not one of which involved a claim for conversion. [*Beaudrot v. Southern Railway Co.*, 69 S.C. 160, 48 S.E. 106 (1904) (trespass); *Bradley v. Metropolitan Life Insurance Co.*, 162 S.C. 303, 160 S.E. 721 (1931) (breach of contract accompanied by a fraudulent act); *Eaddy v. Greensboro-Fayetteville Bus Lines*, 191 S.C. 538, 5 S.E.2d 281 (1939) (breach of duty by common carrier); *Morrow v. Evans*, 223 S.C. 288, 75 S.E.2d 598 (1953) (auto collision); *Weatherford v. Home Finance Co.*, 225 S.C. 313, 82 S.E.2d 196 (1954) (fraud); *Hall v. Walters*, 226 S.C. 430, 85 S.E.2d 729 (1955) (assault); *Norton v. Ewaskio*, 241 S.C. 557, 129 S.E.2d 517 (1963) (traffic accident); *Hicks v. Herring*, 246 S.C. 429, 144 S.E.2d 151 (1965) (auto collision); *Thompson v. Home Security Life Insurance*, 271 S.C. 54, 244 S.E.2d 533 (1978) (breach of insurance contract accompanied by fraudulent act)]. Contrary to that analysis, the *Haslip* case makes it clear that inquiry as to the reasonableness of the amount of punitive damages in any given case must be made in light of their purpose of punishing "what has occurred and to prevent its repetition" (111 S.Ct. at 1045).

II.

The questions presented are important ones which warrant review by this Court.

The constant stream of litigation in recent years involving constitutional constraint on punitive damages awards is clear indication of the necessity for close adherence to this Court's guidance on the application of meaningful and definite standards in assessment of the amount of such awards. The approach of the court below in the instant cases undermines basic principles implicit in this Court's decision in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. _____, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), concerning issues of a recurring nature and foreshadows continuing failure of the court below to apply those principles properly unless corrected by this Court.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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September 11, 1991.

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1509

GEORGE W. GUILL, Plaintiff - Appellee,

versus

ACADEMY LIFE INSURANCE CO., Defendant - Appellant,

ACADEMY INSURANCE GROUP, INC.; PENSION GROUP OF AMERICA; PENSION LIFE INSURANCE COMPANY OF AMERICA; ACADEMY SERVICES, Defendants.

No. 89-1510

NORRIS O. WHITLEY, Plaintiff - Appellee,

versus

ACADEMY LIFE INSURANCE CO., Defendant - Appellant,

ACADEMY INSURANCE GROUP, INC.; PENSION GROUP OF AMERICA; PENSION LIFE INSURANCE COMPANY OF AMERICA; ACADEMY SERVICES, Defendants.

Appeals from the United States District Court for the District of South Carolina, at Columbia. Karen L. Henderson, District Judge. (CA-87-2829-3-16, CA-87-2860-3-16)

Argued: February 8, 1990 Decided: June 19, 1991

Before RUSSELL and WILKINS, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished opinion. Senior Judge Butzner wrote the opinion, in which Judge Russell and Judge Wilkins joined.

ARGUED: James Wright Crabtree, SMATHERS & THOMPSON, Charlotte, North Carolina, for Appellants. Peter L. Murphy, GLENN, IRVIN, MURPHY, GRAY & STEPP, Columbia, South Carolina; Mortimer Meyer Weinberg, Jr., WEINBERG, BROWN & MCDOUGALL, Sumter, South Carolina, for Appellees. **ON BRIEF:** Charles E. Baker, BELSER, BAKER, BARWICK, RAVENEL & BENDER, Columbia, South Carolina, for Appellants.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

BUTZNER, Senior Circuit Judge:

Academy Life Insurance Company appeals a judgment entered on a verdict for conversion of commissions it owed to George W. Guill and Norris G. Whitley. Academy claims

that the evidence does not support the verdict and that punitive damages were excessive. We held this case in abeyance awaiting the decision in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991), for guidance on the issue of punitive damages. We now affirm.

I

Academy sells life insurance through a three-level sales force composed of agents, general agents (GAs), and managing general agents (MGAs). Academy's employment contracts provide that its agents are independent contractors. They receive sales commissions whenever they, or agents they supervise, sell a policy and thereafter whenever premiums are paid on that policy. The MGAs' right to commissions vests upon sale of the policy, and commissions are payable while the policy is in force.

Academy calculates commissions by computer as the premiums are received, and the commissions are credited to accounts assigned to each agent involved. These accounts are also used to record advances given to agents by Academy. Advances are considered loans, which agents repay with interest. In addition, MGAs have "escrow" accounts for recording a certain percentage of their commissions to serve as "collateral" for debts owed to Academy, primarily for advances, by GAs and agents operating under the MGAs. The MGAs are ultimately responsible for such debts. Academy pays interest on funds in escrow and other agent accounts, beginning 60 days after receipt of premiums.

Guill and Whitley joined Academy in the late 1970s. They began as agents and advanced to become general agents, then managing general agents. Academy fired both in July of 1986, but according to their contract Academy was obligated to pay them renewal commissions on certain existing policies which they, or agents they supervised, had sold. Following the terminations, Academy began reducing its monthly payments to the men and stopped sending the documentation which customarily accompanied those payments. Academy stopped sending the payments altogether in 1988, alleging that Guill and Whitley

had materially breached their contracts by soliciting for another life insurer.

Guill and Whitley claimed that Academy owed them commissions from premiums paid on policies which had been improperly removed from their accounts, because the agents who sold the policies were apparently reassigned to other MGAs following the termination of Guill and Whitley.

There was also evidence that escrow funds were misappropriated by Academy. Funds could be drawn from escrow accounts for only two purposes—to repay debts for which the MGA was responsible or to pay the MGA. Guill and Whitley testified that they had not received any payments from their escrow accounts, nor did they owe any money to Academy. Nonetheless, funds were withdrawn from the escrow accounts. What happened to the funds is unclear.

Guill and Whitley sued Academy in September of 1987, alleging breach of contract and conversion. In June of 1989, the district court directed a verdict against Academy for breach of contract and sent the issues of conversion and damages to the jury. The jury found against Academy on the conversion claim, returning a verdict for Guill in the amount of $51,449 actual damages and for Whitley in the amount of $25,390 actual damages. The jury awarded punitive damages of $250,000 each to Guill and Whitley.

Academy moved for judgment n.o.v. on the conversion claims and consequent punitive damages, asserting that there was insufficient evidence to support a finding of conversion. It sought a new trial to determine the damages resulting from Academy's breach of contract. Alternatively, Academy moved for a new trial because the damages were excessive, contrary to the clear weight of the law, and unduly liberal. The district court denied Academy's motions and Academy appealed.

II

The law in South Carolina on conversion was explained in *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 496-97, 220 S.E.2d 116, 119 (1975):

> Conversion has been defined in our case law as an unauthorized assumption and exercise of the right of

ownership over goods or personal chattels belonging to another, to the exclusion of the owners' rights. Conversion may arise by some illegal use or misuse, or by illegal detention of another's chattel.

Money may be the subject of conversion, when it is capable of being identified, and there may be conversion of determinate sums even though the specific coin and bills are not identified. However, there can be no conversion where there is a mere obligation to pay a debt. (citations omitted).

Academy claims that the commissions owed to Guill and Whitley were debts which were to be paid out of Academy's general funds and its retention of the commissions was, therefore, not conversion. Academy relies upon *Owens v. Zippy Mart of S.C.*, 268 S.C. 383, 234 S.E.2d 217 (1977). In *Zippy Mart* the South Carolina Supreme Court held that an employer's withholding of an employee's wages because the employer believed that the employee had stolen money did not constitute conversion.

The South Carolina Supreme Court has distinguished mere failure to pay a debt, as in *Zippy*, from affirmative misconduct in the failure to pay a debt, as in *Andrews*. In *Andrews* the bank failed to return a customer's deposit when she closed the account. Instead, the bank retained her money as security against a debt that her husband owed the bank. The South Carolina Supreme Court held that this constituted conversion.

In *Zippy Mart* the Supreme Court noted that *Andrews* "was predicated on conduct more onerous than a simple breach of contract. . . . While emphasizing the depositor's immediate right to possession and the want of any legal right to detain delivery of funds, *Owens* was couched primarily on the character and motive of the conduct involved." 268 S.C. at 385, 234 S.E.2d at 218. Zippy Mart's mere failure to pay disputed wages was not "oppressive conduct . . . sufficient to constitute a tort of conversion." 268 S.C. at 386, 234 S.E.2d at 218.

Taken together, *Zippy Mart* and *Andrews* show that in South Carolina, onerous conduct in refusing to pay money

that indisputably belonged to the plaintiff will transform a breach of contract to pay a debt into conversion. For example, in *McTeer v. Provident Life & Accident Ins. Co.*, 712 F. Supp. 512, 518 (D.S.C. 1989), the district court held that a disputed claim to an interest payment was not conversion, because there was no "onerous conduct of the sort that would convert [the parties'] relationship into something more than that of debtor-creditor."

In this case, Academy's conduct satisfies the onerous conduct requirement of conversion. Academy took affirmative steps to hide the premiums it owed to the plaintiffs. There was also ample evidence that Academy misused the commissions. Guill and Whitley both testified that Academy failed to pay them the commissions they earned, suggesting that Academy reassigned the commissions to other agents. Further, both men testified to the unauthorized use of funds in their escrow accounts and to Academy's failure to provide information about the activity in their accounts.

In a related point, Academy argued that the plaintiffs failed to identify specific money to show conversion.

Academy is correct that the plaintiffs must be able to identify the money that has been converted. But "there may be conversion of determinate sums even though specific coin and bills are not identified." *Andrews*, 265 S.C. at 496-97, 220 S.E.2d at 119. Guill and Whitley identified specific amounts of money that the jury could find belonged to them. Guill and Whitley were independent contractors who sold Academy's insurance in exchange for a specific percentage of the premiums. Although the premiums were collected by Academy, they were allocated upon receipt between Academy and the agents involved. Some of the funds were withheld in "escrow" accounts to offset advances or other debts owed by agents to Academy. In addition, Academy paid interest on these funds, further indicating that the funds were the agents' property.

There is no error in the court's charge to the jury. The charge thoroughly set out the law in South Carolina on conversion and distinguished conversion from breach of contract. The court's instructions on conversion, which are

set out in the margin,* were taken directly from South Carolina case law. The instructions emphasized that to find conversion the jury had to find that the money was identifiable and that Academy had misused the money to the detriment of Guill and Whitley in what amounted to "onerous conduct." Because there is sufficient evidence to support the verdict, we affirm the district court's denial of Academy's motion for judgment n.o.v. on the conversion claim.

III

Academy also appeals the award of punitive damages, which was more than four times the award of compensatory damages. Academy maintains that the award is excessive and a violation of its due process rights.

The Supreme Court has recently foreclosed Academy's due process claim. *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991). The award is not so large that it is excessive as a matter of law. South Carolina courts have upheld punitive damage awards as large as ten times the actual damage award. *See Robertson v. State Farm Mut. Auto. Ins. Co.*, 464 F. Supp. 876, 879 (D.S.C. 1979) (compendium of punitive damages awards). Consequently, we will not disturb the punitive damage award in this case.

AFFIRMED

*Money may be the subject of conversion, but an action for conversion will not lie to enforce a mere obligation to pay money. *Dawkins v. National Liberty Life Ins. Co.*, 263 F. Supp. 119 (D.S.C. 1967). For money to be the subject of conversion it must be capable of being identified, and there can be conversion of determinate sums even though the specific coin and bills are not identified. *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 220 S.E.2d 116 (1975).

A person may not recover damages for conversion if the defendant is merely exercising a legal right or if the claim is for the payment of a mere debt. *Owens v. Zippy Mart of South Carolina, Inc.*, 268 S.C. 383, 234 S.E.2d 217 (1977). Thus, the plaintiffs may not recover from the defendant on their conversion claims if you find that there is merely the relationship of debtor and creditor between the plaintiffs and the defendant or if you find that the plaintiffs' claims are for mere breach of contract. *Id.* The plaintiffs must establish more onerous conduct by the defendant, such as use of the money for its own wrongful purpose to the plaintiffs' detriment. *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 498, 220 S.E.2d 116 (1975). (Citations were omitted when read to the jury).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

GEORGE W. GUILL, Plaintiff

versus

ACADEMY LIFE INSURANCE COMPANY, Defendant

Civil Action No. 3:87-2829-16

NORRIS O. WHITLEY, Plaintiff

versus

ACADEMY LIFE INSURANCE COMPANY, Defendant

Civil Action No. 3:87-2860-16

ORDER

Entered 7/25/89

This matter is before the Court on the defendant's motions for judgment notwithstanding the verdict, for a new trial or for remittitur. On a motion for judgment n.o.v., the Court must consider the record as a whole and in the light most favorable to the party opposing the motion and, if there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that reasonable and fair minded men in the exercise of impartial judgment could reasonably return a verdict for the nonmoving party, the motion should be denied. *Wyatt v. Interstate & Ocean Transp. Co.*, 623 F.2d 888, 891 (4th Cir.

1980). Alternatively, on a motion for new trial the Court should set aside a verdict and grant a new trial, even though it is supported by substantial evidence, if the verdict was reached under improper instructions or if the Court is of the opinion that the verdict is against the clear weight of the evidence or is based upon evidence which is false or will result in a miscarriage of justice. *Wyatt*, 623 F.2d at 891-92. Because the Court concludes the jury was properly instructed and because it finds the verdict supported by substantial evidence and not against the clear weight of the evidence, the defendant's motion is denied.

At the trial the plaintiffs claimed that the defendant breached its contract with them, former insurance salesmen affiliated with the defendant. The plaintiffs claimed that, after their contractual relationship with the defendant terminated, the defendant breached their contracts by not paying them their commissions on life insurance policies they had sold while their contracts with the defendant were in force. In addition to the breach of contract claim, the plaintiffs alleged that the defendant converted the commissions owed them by reassigning the commissions to other agents. The Court directed a verdict on the breach of contract claim in favor of the plaintiffs and the jury awarded each plaintiff the amount of commissions each claimed to be owing plus ten percent interest and punitive damages of $250,000.

The defendant first argues that the Court should grant its motion for judgment n.o.v. by striking the punitive damages awards and should order a new trial as to the issue of actual damages on each plaintiff's breach of contract claim. The defendant argues the punitive damages are improper because there was insufficient evidence adduced at trial to support a conversion claim. The evidence was insufficient, according to the defendant, because it showed only that the money at issue was a debt owed to the plaintiffs and that it was not sufficiently determinate and specific to be the subject of a conversion.

None of the parties disputes the Court's substantive charge on the law of conversion in South Carolina or the Court's explanation to the jury as to the findings it had to

make in order to hold the defendant liable for conversion.[1] The charge correctly informed the jury of the following principles:

> Money may be the subject of conversion, but an action for conversion will not lie to enforce a mere obligation to pay money. *Dawkins v. National Liberty life Ins. Co.*, 263 F. Supp. 119 (D.S.C. 1967). For money to be the subject of conversion it must be capable of being identified, and there can be conversion of determinate sums even though the specific coin and bills are not identified. *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 220 S.E.2d 116 (1975).
>
> A person may not recover damages for conversion if the defendant is merely exercising a legal right or if the claim is for the payment of a mere debt. *Owens v. Zippy Mart of South Carolina, Inc.*, 268 S.C. 383, 234 S.E.2d 217 (1977). Thus, the plaintiffs may not recover from the defendant on their conversion claims if you find that there is merely the relationship of debtor and creditor between the plaintiffs and the defendant or if you find that the plaintiffs' claims are for mere breach of contract. *Id.* The plaintiffs must establish more onerous conduct by the defendant, such as use of the money for its own wrongful purpose to the plaintiffs' detriment. *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 498, 220 S.E.2d (1975).[2]

The Court concludes there was substantial evidence from which the jury could determine that the funds at

---

[1] The only part of the charge with which the defendant now disagrees is the following statement: "[T]he plaintiffs allege that by withholding money owed them under their contract, and by applying that money to other uses, the defendant converted the money owed them." The Court rejects the challenge to this statement, first, because the defendant did not raise a timely objection to it before or immediately after the charge was delivered. Fed. R. Civ. P. 51. As to the merits of the defendant's objection, the Court concludes the statement in the context of the charge as a whole did not prejudice the defendant.

[2] The written jury charge was as quoted here; nevertheless, the jury charge as delivered did not include the citations.

issue were sufficiently determinate to be subject to the defendant's conversion. The evidence was undisputed that the plaintiffs were independent contractors, not employees. *Cf. Owens v. Zippy Mart of South Carolina, Inc.*, 268 S.C. 383, 234 S.E.2d 217 (1977). Moreover, sufficient evidence was presented that, although the defendant collected premiums on the plaintiffs' behalf, the percentages of premiums designated in the contracts as due the plaintiffs belonged to and were the property of the plaintiffs as the premiums were collected. The only defense witness testified that the defendant's computer system "allocated" the premiums collected between the plaintiffs' portion and the defendant's portion. In addition, funds withheld from the plaintiffs as an off-set for advances and other debts owing to the defendant were designated as "escrow" funds, again raising the inference that these funds were both determinate and the property of the plaintiffs. Based on this evidence, and for the reasons given at trial for declining to direct a verdict for the defendant on the conversion claim, the defendant's motion for judgment n.o.v. on this ground is denied. In addition, the Court does not find the jury's verdict on this claim to be against the clear weight of the evidence and denies the defendant's motion for a new trial. The Court also finds that the jury acted in accordance with the charge in adding ten percent interest to the amount of actual damages awarded for conversion. The award of interest is therefore properly included in the judgment.

The defendant further argues that the Court should not have charged conversion to the jury. To the extent the defendant objects to the substance of the charge on conversion, the objection is barred because the only objection raised at trial was that the issue of conversion should not go to the jury at all. Fed. R. Civ. P. 51; *T. C. Allen Construction Co. v. Stratford Corp.*, 384 F.2d 653 (4th Cir. 1967). For the reasons already discussed, the Court finds that sufficient evidence existed in the record to warrant a charge on conversion.

The defendant next complains that the Court erred in allowing the plaintiffs' counsel to cross-examine the

defense witness with regard to difficulties the defendant had experienced with a life insurance product known as E-95. As the Court ruled at trial, the Court concludes that the testimony was properly admitted because of its relevance to the plaintiffs' conversion claim.

As an alternative ground for a new trial, the defendant argues the verdict should be set aside as being excessive and against the clear weight of the evidence. Under Fed. R. Civ. P. 59, a district court has the discretion to grant a new trial if, based on the Court's own view of the evidence and the credibility of the witnesses, the Court concludes the size of the verdict is either excessive or against the clear weight of the evidence. *Virginian Ry. Co. v. Armentrout*, 166 F.2d 400 (4th Cir. 1948); *Wyatt*, 623 F.2d at 891-92; *see also Occidental Life Insurance Co. of North Carolina v. Pat Ryan & Associates*, 496 F.2d 1255, 1264 (4th Cir.), *cert. denied*, 419 U.S. 1023 (1974); *Great Coastal Express, Inc. v. International Brotherhood of Teamsters*, 511 F.2d 839, 845-48 (4th Cir. 1975).

Here, the court does not deem the verdict for actual and punitive damages to be excessive. The actual damages award represents the amount the plaintiffs claim they are due. The plaintiffs testified as to how they computed their figures in some detail and the defendant had ample opportunity to cross-examine the plaintiffs on this issue. The defendant also presented its version of how the amounts owed should be calculated. The defense obviously failed to convince the jury that its method was more accurate than that used by the plaintiffs. The Court concludes that substantial evidence supported the jury's determination that the plaintiffs' version of the money due was correct. In addition, the Court finds that the verdict for actual damages is not against the clear weight of the evidence and was not rendered under the influence of passion, prejudice or other improper considerations. The Court therefore denies the defendant's motions for judgment n.o.v., for a new trial and for a remittitur based on the size of the actual damages award.

The defendant also contends that the punitive damages award was excessive and the Court should grant a new

trial on this basis. In a diversity action, state substantive law determines the circumstances justifying punitive damages and federal law governs the trial court's review of the size of the jury verdict. *Shamblin's Ready Mix, Inc. v. Eaton Corp.*, 873 F.2d 736, 738 (4th Cir. 1989) (citing *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649 (1977). Under south Carolina law, the assessment of punitive damages requires consideration of "the character of the tort committed, the punishment which should be meted out therefor, and the ability of the defendant to pay the damages awarded." *Albertini v. Veal*, 292 S.C. 561, 357 S.E.2d 716, 718 (Ct. App. 1987). Applying these factors here, the Court concludes the punitive damages awards are not excessive.

For the foregoing reasons, the Court denies the defendant's motions for judgment n.o.v., or in the alternative, for a new trial and for remittitur.

IT IS SO ORDERED.

/s/
KAREN LeCRAFT HENDERSON
UNITED STATES DISTRICT JUDGE

Columbia, South Carolina
July 24, 1989

(2)

No. 91-465

FILED
OCT 15 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

ACADEMY LIFE INSURANCE COMPANY,

Petitioner,

v.

GEORGE W. GUILL,

Respondent.

ACADEMY LIFE INSURANCE COMPANY,

Petitioner,

v.

NORRIS O. WHITLEY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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RESTATED QUESTIONS PRESENTED

I. Whether the conclusion of the Court of Appeals that this Court's opinion in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991) foreclosed Petitioner's due process claim warrants review by this Court.

II. Whether Petitioner's due process claim should be reviewed by this Court in spite of Petitioner's failure to raise the claim timely in the District Court.

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STATEMENT OF THE CASE

Respondents are veterans of the Armed Forces of the United States, having served over 30 and 20 years respectively. Upon their retirements, they became agents of Petitioner, a life insurance company that aims almost exclusively at the military market. Notwithstanding considerable success as salesmen, both men had their contracts terminated in the summer of 1986. By that time, both had three different levels of contract with Petitioner, those being Agent, General Agent and Managing General Agent. Each category entailed different responsibilities and earned Respondents varying degrees of commission, the bulk of their income being derived from "override commissions" on policies sold by salesmen assigned to them. Under their contracts, Respondents had become "vested", meaning their entitlements to commissions survived as long as the policies sold remained in place and premiums were paid, regardless of whether Respondents continued as agents.

Throughout their tenure with Petitioner, Respondents received, as did all of Petitioner's salesmen, monthly reports detailing the status of every policy in existence in which they had any kind of a commission interest. These reports also reflected the status of Respondents' individual "escrow" accounts, established by Petitioner as collateral for the repayment to the company of any agents' debt for which Respondents might be liable under their contracts. The source of funds for these accounts were the commissions earned by Respondents, funds which otherwise were immediately due and payable to them. Petitioner also added interest monthly to these accounts.

The record is uncontested that the only two reasons these accounts could be reduced was either satisfaction of debt owed by Respondents to Petitioner or through disbursements to Respondents. The record is likewise uncontested that these accounts were reduced in spite of the fact that no debt existed and no payments were received by Respondents.

Shortly after being terminated, Respondents' commission checks were drastically reduced. Further, Petitioner ceased forwarding the voluminous and detailed statements that had accompanied the monthly checks previously. Thus, although Respondents knew they were not receiving the full amounts due them, they were unable to determine exactly what was due.

Following receipt of Petitioner's documents prior to trial, it was determined that certain but not all agents assigned to Respondents had been removed from their statements. It thus became apparent how the reduction in Respondents' commissions had been accomplished. By removing certain salesmen from Respondents' accounts, Petitioner had ceased crediting Respondents with the override commissions due on policies sold by those agents. Petitioner maintained at trial that these missing agents, and the substantial numbers of policies and commissions generated by them, had been relegated to Respondents' "escrow" accounts which was the reason they did not appear on Respondents' statements. Alternatively, and contradictorily, Petitioner also claimed that names ceased to appear because those agents had been reassigned to other Managing General Agents. Petitioner's only witness admitted, however, that agents who

were either still working for Petitioner or had left Petitioner in a "vested" status should continue to appear on Respondents' statements even after Respondents' terminations. He acknowledged that this was due to the continuing override interest Respondents had in the policies sold by those agents since both Respondents were vested. Notwithstanding this admission, Petitioner's only witness could offer no logical explanation for why the names of some agents who were still contracted with Petitioner and had worked for Respondents ceased to appear on Respondents' statements. He acknowledged that if agents, and therefore the overrides on all the policies they had written, had been taken from Respondents, that Respondents' damages would be greater than Petitioner was admitting.

Suit was filed in September 1987, Petitioner's Answer being served, following removal, approximately one month later. Petitioner's Answer did not raise any challenge to the punitive damages claim other than to contest the underlying factual allegations. Specifically, no due process challenge was made at any time all the way through the trial of the case in June of 1989. No mention of a constitutional challenge on any ground was made at the directed verdict stage of the trial, nor in Petitioner's post-trial motions. The first time Petitioner raised the issue of due process relative to the punitive damage award was in Reply to Plaintiffs' Opposition to Post-Trial Motions. Although included in Petitioner's brief to the Fourth Circuit Court of Appeals, the due process challenge was not raised at oral argument, Petitioners' counsel choosing instead to attack the submission of the conversion cause of action to the jury.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

I.

The Court of Appeals neither misinterpreted nor misapplied this Court's opinion in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991) in reviewing this case. In spite of Petitioner's failure to raise the issue timely in the District Court, and its election to forego argument on the point in the Fourth Circuit, the Court of Appeals stayed its opinion in this case pending this Court's resolution of *Haslip*. Subsequent to this Court's decision in *Haslip*, the Court of Appeals concluded that *Haslip* "foreclosed Academy's due process claim". A review of the factors relied on by this Court in *Haslip* plainly reveals the soundness of the Fourth Circuit's conclusion. As correctly set forth in the Petition, those factors are as follows:

> *" . . . (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred."*

This is a case in which Petitioner was accused of nothing less than deliberately stealing Respondents' money. At trial, Respondents proved that Academy, for its own benefit and/or the benefit of others still in its employ, deliberately reduced payment of commissions owed to Respondents. This was accomplished through the removal of agents previously assigned to Respondents from Respondents' accounts, thereby transferring either to Academy itself or to other, more favored Managing General Agents, the commissions on policies which those agents had written and from which Respondents derived "override" commissions. Further, there was

uncontested evidence that Respondents' "escrow" accounts had been reduced, the records reflecting in some instances payments to an officer of Academy from at least one of those accounts. The only legitimate reasons for reductions in escrow accounts were satisfaction of agent debt or payment to Respondents. Petitioner admitted that no debt was owed by Respondents and offered no proof to contradict Respondents' sworn testimony that no payments from their escrow accounts were received by them. Respondents also proved that Petitioner attempted to conceal its theft of Respondents' money by withholding and, in some cases altering, the documentation detailing the status of policies and commissions. While these charges were contested by Academy, the jury found in favor of Respondents, which findings have been sustained by both the District Court and the Court of Appeals. Under these facts, there is clearly a reasonable relationship between the punitive damages award and the harm resulting from defendant's conduct.

> *" . . . (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct."*

Respondents submit that the degree of reprehensibility of Petitioner's conduct in this case is self-evident. The theft continued over a period of years and was deliberate, as was Petitioner's attempt at concealment. Further, Respondents presented evidence through the testimony of another former salesman that Petitioner was engaged in similar conduct with him.

> *" . . . (c) the profitability to the defendant of the wrongful conduct and the desirability of removing*

that profit and of having the defendant also sustain a loss."

The actual damage proven was approximately $75,000.00. That a jury chose to punish this company for its attempt to defraud its former salesmen of such a significant sum of money is hardly surprising and, indeed, desirable.

" . . . (d) the 'financial position' of the defendant."

Academy's own evidence revealed it was a company holding over 400,000 policies, operating through 1,000 agents from Guam to Germany. Further, the evidence demonstrated it had absorbed a payback to policy holders of approximately 55 million dollars which it had argued to the District Court caused no financial hardship.

" . . . (e) all the costs of litigation."

Obviously the Respondents were forced to retain the services of two attorneys and prosecute this case to verdict with all the costs normally attendant to such an effort.

" . . . (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation."

No criminal sanctions have been imposed upon Petitioner for its conduct in this case.

" . . . (g) the existence of other civil awards against the defendant of the same conduct, these also to be taken in mitigation."

No other civil awards have been obtained against Petitioner for its conduct in this case.

Respondents respectfully submit, under the facts of this case, that it is obvious why the Court of Appeals concluded that *Haslip* foreclosed Petitioner's due process claim and why that issue merited no more discussion than the review of the facts as presented in the Court of Appeals unpublished opinion.

II.

In its Petition for Writ of Certiorari, Academy suggests that consideration by the jury of the character and degree of its wrongful conduct toward Respondents was not mandated by the Court's instructions. This is simply not the case as a review of the Court's charge demonstrates. After being instructed carefully and correctly concerning the substantive law of conversion, the Court turned to the issue of damages. The Court first instructed the jury concerning actual damages on the breach of contract claim. Then, with regard to damages for conversion, the Court said:

> Now, if you find for the Plaintiffs on their conversion cause of action, and if you find that the Defendant converted the property innocently, that is, by mistake or under a bona fide belief or right, the measure of damages is the value of the property or amount of money converted, with interest, thereon from the date of conversion to the date of trial.
>
> And the Plaintiffs are entitled to no more than that amount.
>
> Please remember, however, my instruction that you may not award actual damages more than once for the same loss.

> The Plaintiffs are also seeking punitive damages in their conversion cause of action.
>
> The law permits the jury, under certain circumstances, to award punitive damages in order to punish a wrong-doer for some extraordinary misconduct, and to serve as a warning not to engage in such conduct in the future.
>
> Thus, if you find that the Plaintiffs have shown by a preponderance of the evidence, that the defendant converted the Plaintiffs' money with malice, ill will, a conscious indifference to the rights of others, or a reckless disregard for the rights of others, you may award the Plaintiffs punitive damages.
>
> If you so find, it becomes your right to award punitive damages in such an amount as you unanimously agree to be proper *in light of* the character of the wrong committed, the punishment which should be applied, and the ability of the Defendant to pay. (Emphasis supplied.)

Therefore, as in *Haslip*, these instructions " . . . thus enlightened the jury as to the punitive damages' nature and purpose, indentified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory." *Pacific Mutual Life Ins. Co v. Haslip*, 111 S.Ct. at 1044. The very sentence which told the jury it could award punitive damages limited the jury's discretion in that regard to a consideration of the factors relied on by this Court in *Haslip*. Thus, if the Court is disposed to answer Petitioner's first question presented in the affirmative, this case hardly

presents a good vehicle for doing so as Petitioner had the benefit of that which it seeks. The instruction was mandatory with regard to the consideration of the character of the wrong and the punishment that should be applied to it. Merely the absence of the word "must" in the grammatical structure of the instruction does not render it otherwise. The jury having been limited in its consideration of punitive damages to one made "in light of" the factors relied on in *Haslip*, there is no need to reaffirm that position through the grant of a Writ in this case.

III.

Petitioner failed to preserve any objection on constitutional grounds to the punitive damage award in this case. Petitioner did not raise the issue in its Answer or any amendments thereto. Nor was the issue raised at directed verdict stage. Likewise, Petitioner raised no objection to the charge regarding punitive damages. Not even in Petitioner's Motion for JNOV (or in the alternative, for new trial) did Petitioner seek relief on any constitutional ground. The claim that the relief sought violated the Constitution of the United States is an affirmative defense. As such, the failure to have pleaded it in the Answer operates as a waiver. Fed.R.Civ.P. 8(c), *Butts v. Curtis Publishing Co.*, 225 F. Supp. 916, 920 (N.D. Ga. 1964), *aff'd*, 351 F.2d 702 (5th Cir. 1965), *aff'd*, 388 U.S. 130 (1967), *Marx & Co., Inc. v. The Diners Club*, 550 F.2d 505, 512 (2nd Cir. 1977), 5 Wright and Miller, Federal Practice and Procedure: § 1347 at 533 (1969).

Merely the denials of the paragraphs in Respondents' complaints seeking punitive damages did not preserve any right to a defense based on constitutional principles. Respondents respectfully submit that this Court should not allow Petitioner to make a constitutional contention out of a nonconstitutional denial. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 n. 23 (1989). A nonspecific denial does not provide notice to the plaintiff of defendant's precise claims and does not "promote the expeditious and simultaneous presentation of defenses and objections" in the manner intended by the rules of pleading. 5A Wright and Miller, Federal Practice and Procedures: § 1346 at 532 (1969).

Further, a Motion for JNOV is only a renewal of the motion for a directed verdict; therefore, a party cannot assert in it a new theory which was not raised in the directed verdict motion. *Johnson v. Rogers*, 621 F.2d 300, 305 (8th Cir. 1980), *Sulmeyer v. Coca Cola Company*, 515 F.2d 835, 846 (5th Cir. 1975), 9 Wright and Miller, Federal Practice and Procedure: § 2537 at 598 (1971).

Petitioner's failure to object at trial to the charge concerning punitive damages should likewise bar it from raising these issues in this Court. Objection to a jury charge must be made at trial or the objection is waived. Fed.R.Civ.P. 51, *Havee v. Belk*, 775 F.2d 1209, 1120 (4th Cir. 1985), *Jarrell v. Ford Motor Co.*, 327 F.2d 233, 236 (4th Cir. 1964). A party must "state distinctly the matter to which he objects and the grounds of his objection", Fed.R.Civ.P. 51, so as "to bring into focus the precise nature of the alleged error". *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943).

Petitioner's failure to provide any timely notice to the Respondents or to the District Court of its objection to the submission of punitive damages to the jury on constitutional grounds precluded both Respondents and the Court from any development of the record in that regard. Petitioner should not now be allowed to benefit from its failure to raise the issue by claiming error in the failure of the Court to provide that which Petitioner did not seek.

CONCLUSION

Respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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October 15, 1991

FILED
OCT 21 1991
OFFICE OF THE CLERK

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Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

On October 11, 1991, subsequent to petitioner's filing of the Petition for Writ of Certiorari herein, the United States Court of Appeals for the Fourth Circuit, by a panel different from the panel that decided the instant cases, rendered its decision in *Mattison v. Dallas Carrier Corp.*, ___ F.2d ___, 1991 WL 204314 (4th Cir. 1991), holding that

the South Carolina law for awarding punitive damages which had been applied by the district court, whose jurisdiction was based on diversity of citizenship, denied the defendant therein due process in violation of the Fifth Amendment "because its lack of meaningful standards allowed the jury to exercise unconstrained discretion in making its awards." The opinion in the *Mattison* case is not yet reported and is reproduced in the Appendix hereto for the convenience of the Court.

In the *Mattison* case, the Court of Appeals reversed a jury award of punitive damages and remanded the case for a new trial as to punitive damages, requiring that the district court's instructions as to the amount of punitive damages that may be awarded include instructions on four aspects derived from this Court's decision in *Pacific Mutual Ins. Co. v. Haslip*, 499 U.S. ___, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), and the subsequent decision of the Supreme Court of South Carolina in *Gamble v. Stevenson*, ___ S.C. ___, 406 S.E.2d 350 (1991), to wit:

> (1) *Relationship to harm caused*: Any penalty imposed should take into account the reprehensibility of the conduct, the harm caused, the defendant's awareness of the conduct's wrongfulness, the duration of the conduct, and any concealment. Thus any penalty imposed should bear a relationship to the nature and extent of the conduct and the harm caused, including the compensatory damage award made by the jury.
>
> (2) *Other penalties for the conduct*. Any penalty imposed should take into account as a mitigating factor any other penalty that may have been imposed or which may be imposed for the conduct involved, including any criminal or civil

penalty or any other punitive damages award arising out of the same conduct.

(3) *Improper profits and plaintiff's costs*: The amount of any penalty may focus on depriving the defendant of profits derived from the improper conduct and on awarding the costs to the plaintiff of prosecuting the claim.

(4) *Limitation based on ability to pay*: Any penalty must be limited to punishment and thus may not effect economic bankruptcy. To this end, the ability of the defendant to pay any punitive award entered should be considered.

The decision of the United States Court of Appeals for the Fourth Circuit in *Mattison* conforms to the principles recognized and applied by this Court in *Haslip* in the context of an action tried in the diversity jurisdiction of the federal court and is at odds with the prior decision rendered by the Court of Appeals in the instant cases. Petitioner submits that the analysis in *Mattison* is correct and that this Court should grant certiorari and remand the instant cases for like disposition by the court below.

Respectfully submitted,

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October 21, 1991.

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

VIVIAN MATTISON; MORTY RONALD MATTISON, *Plaintiffs-Appellees,* v. DALLAS CARRIER CORPORATION, *Defendant-Appellant.*	No. 91-3008

Appeal from the United States District Court
for the District of South Carolina at Greenville.
G. Ross Anderson, Jr., District Judge.
(CA-90-1251-6-3, CA-90-1252-6-3)

Argued: June 5, 1991

Decided: October 11, 1991

Before ERVIN, Chief Judge, NIEMEYER, Circuit Judge, and ELLIS, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed in part, reversed in part, and remanded with instructions by published opinion. Judge Niemeyer wrote the opinion, in which Chief Judge Ervin joined. Judge Ellis, who participated in the argument, did not participate in the decision. The decision of the court is by a quorum, 28 U.S.C. § 46(d).

COUNSEL

ARGUED: George Kermit Lyall, NELSON, MULLINS, RILEY & SCARBOROUGH, Greenville, South Carolina, for Appellant. William Jeffry Weston, CODE & WESTON, P.A., Greenville, South Carolina, for Appellees. **ON BRIEF:** Edwin L. Turnage, NELSON, MULLINS, RILEY & SCARBOROUGH, Greenville, South Carolina, for Appellant. Merl F. Code, CODE & WESTON, P.A., Greenville, South Carolina, for Appellees.

OPINION

NIEMEYER, Circuit Judge:

Although punitive damages have been awarded in the United States in diverse circumstances for approximately two hundred years, only recently have they been awarded in such amount and with such frequency that the activity has awakened a constitutional conscience about them. In this case we hold that the South Carolina law for awarding punitive damages, applied by the district court whose jurisdiction was based on diversity of citizenship, denied the defendant due process in violation of the Fifth Amendment, because its lack of meaningful standards allowed the jury to exercise unconstrained discretion in making its awards. We reject the defendant's remaining assignments of error in this case. Accordingly, we affirm the award of compensatory damages, and with respect to punitive damages we reverse and remand for a new trial.

I

Morty Mattison and his wife, Vivian, were driving home in a downpour during the late afternoon of August 30, 1989, when they collided with the rear of an eighteen-wheel tractor trailer parked in the right-hand lane of South Carolina Secondary Road 107 in Greenville, South Carolina. Secondary Road 107 consists of four lanes divided by a median "emergency lane." Although the Mattisons were travelling slowly, at approximately 20 miles per hour, they were unable to see the parked tractor trailer in time to stop, even though the tractor trailer had its flashers operating, because the rain "virtually obscured visibility." The driver of the tractor trailer, who was returning to his office only a mile away, had stopped in the right travel lane to make a phone call to his dispatcher. As the result of the collision, Mr. Mattison sustained a broken arm, a broken finger, and an aggravation of his pre-existing hip condition. Mrs. Mattison sustained pain and stiffness in her back and neck, numbness in her face, and problems with shortness of breath.

Relying on federal jurisdiction based on diversity of citizenship, the Mattisons sued Dallas Carrier Corporation, the owner of the tractor trailer, in federal court, alleging negligence, gross negligence, and recklessness in the operation of the tractor trailer by its driver. A jury awarded Mr. Mattison $100,000 in compensatory damages and Mrs. Mattison $25,000. It also awarded each of them $50,000 in punitive damages, for a total of $100,000. The net worth of Dallas Carrier Corporation at the time of the award was $6,428. The district court denied post-trial motions for judgment notwithstanding the verdict, a new trial, and a remittitur.

On appeal, Dallas Carrier Corporation contends that the law of South Carolina for awarding punitive damages violates the due process and equal protection clauses of the United States Constitution and the South Carolina Constitution. It also contends that (1) the district court erred in permitting a lay witness to give an opinion about the adequacy of emergency flashers, (2) the district court improperly instructed the jury, and (3) the evidence was insufficient to support the verdict.

II

The question of whether South Carolina punitive damages law denies the defendant due process becomes particularly entangled by the grounds of decision given by the Supreme Court in *Pacific Mut. Life Ins. Co. v. Haslip*, ___ U.S. ___, 111 S. Ct. 1032 (1991), for upholding the Alabama punitive damages scheme against an alleged due process violation. In evaluating the Alabama scheme, where instructions to the jury were not significantly different from the schemes previously questioned by members of the Court for their lack of standards, *see id.* at 1045 n.10 (cases cited therein), the Supreme Court turned its attention to the post-verdict process, passing lightly over the pre-verdict process which gave rise to the verdict in the first place. The Supreme Court held that post-trial reviews of awards that are required by Alabama law, in which the trial court and the appellate court apply independent substantive criteria of review, even to the extent of considering evidence that was not before the jury, provide adequate constraints to satisfy due process.

This unusual approach of emphasizing post-verdict review to the extent of perhaps slighting a review of the pre-verdict process, *cf. Giaccio v. Pennsylvania*, 382 U.S. 399, 403-04 (1966), raises significant questions when federal courts, sitting in diversity cases, are confronted with the proper application of state punitive damages. The legitimizing constraints provided by the quasi *de novo* review process practiced under Alabama state law cannot be applied by a federal district court. While a district court must apply the substantive law of the state when instructing the jury on punitive damages, *see Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), it must also apply the Federal Rules of Civil Procedure and, therefore, must review the jury verdict under standards established by Rules 50(b) (directed verdict and j.n.o.v.) and 59 (new trial). Moreover, the review by a federal district court of a jury verdict is always subject to the Seventh Amendment constraints guaranteeing the right to a jury trial which are not imposed on any state-prescribed post-trial review.[1] This division in the application of substantive state law

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[1] U.S. Const. amend. VII provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Seventh Amendment is not binding on the states. *See, e.g., Hardware Dealer Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931); *Pearson v. Yewdall*, 95 U.S. 294, 296 (1877).

and federal procedural law is specifically confirmed in *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989):

> In reviewing an award of punitive damages, the role of the District Court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. The Court of Appeals should then review the District Court's determination under an abuse-of-discretion standard.

See also Defender Indus., Inc. v. Northwestern Mut. Life Ins. Co., 938 F.2d 502, 504-05 (4th Cir. 1991) (en banc).

Because the reviews under Rules 50(b) and 59 are more deferential to jury verdicts than appears to be the process under the state law of Alabama and because the Seventh Amendment does not permit a federal court to substitute its judgment for that of a jury, as long as the jury operates within the constraints of the law and the evidence, the guidance provided by the holding in *Haslip* is of limited assistance. The *Haslip* methodology of analyzing both pre-verdict and post-verdict processes, however, instructs us to consider a hybrid scheme consisting of the substantive law of South Carolina for giving the jury its law on punitive damages and the post-trial review which applies federal standards.

III

The law of South Carolina permits a jury to award punitive damages to punish, deter, and vindicate the

rights of the plaintiff whenever the conduct of the defendant is willful, wanton or reckless. *Rogers v. Florence Printing Co.*, 233 S.C. 567, 106 S.E.2d 258, 261, 263 (1958). The plaintiff must prove by clear and convincing evidence that the conduct included a "consciousness of wrongdoing" at the time of the conduct. *Rogers*, 106 S.E.2d at 263; S.C. Code Ann. § 15-33-135 (Law. Co-op. Supp. 1990) (punitive damages burden of proof). Punitive damages may be awarded only if actual damages are awarded. *See Carroway v. Johnson*, 245 S.C. 205, 139 S.E.2d 908, 910 (1965).

The amount of penalty is commited to the discretion of the jury. The Supreme Court of South Carolina has repeatedly announced that no formula applies in awarding punitive damages and their award and amount are "peculiarly within the judgment and discretion of the jury, subject to the supervisory power of the trial judge over jury verdicts." *See, e.g., Hicks v. Herring*, 246 S.C. 429, 144 S.E.2d 151, 154 (1965). Thus, in *Rogers* the court stated that there is no appropriate ratio between actual damages and punitive damages: "There would appear to be no sound reason for a rule requiring the one to be in definite ratio to the other, no such rule exists in this state." 106 S.E.2d at 262. Similarly, there is no requirement that punitive damages bear any specified relationship to the wealth of the defendant. While the court decisions state that the financial ability of the defendant is a relevant factor for consideration by the jury, it is apparently not limiting, and there is no requirement that the defendant have a means to pay. *See Norton v. Ewaskio*, 241 S.C. 557, 129 S.E.2d 517, 521 (1963) (punitive damages award upheld against a monk "whose wealth [was] known to be

nonexistent"). Moreover, punitive damages awards would apparently be upheld in the absence of any evidence of the worth of the defendant. *See Rogers*, 106 S.E.2d at 263 (punitive damages question is best left to the jury to "arrive at a fair award of such damages whether or not evidence be offered as to the defendant's financial worth").

The only constraint on the award by the jury is provided by the discretion given to the trial court to review the award for excessiveness. *Hicks*, 144 S.E.2d at 154. The review by the appellate court is under an abuse-of-discretion standard. The appellate court will reverse a trial court's refusal to set aside an award only when the award is " 'so shockingly excessive as manifestly to show' that the jury was actuated by caprice, passion or prejudice." *Id.* (citation omitted).[2]

When the verdict is returned in a federal court and is subject to federal standards of review under Rules 50(b) and 59, no significantly greater restraint is provided. The verdict is permitted to stand unless, under Rule 50(b), no substantial evidence is presented to support the award. *Defender Indus.*, 938 F.2d at 505, or, under rule 59, the verdict is "against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice." *Id.* at 507 (*quoting Aetna Casualty & Sur. Co. v. Yeatts*, 122 F.2d 350, 352 (4th Cir. 1941)).

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[2] After this case was argued, the Supreme Court of South Carolina modified its standards for reviewing a punitive damages award in *Gamble v. Stevenson*, 406 S.E. 2d 350 (1991). We discuss the implications of this decision below.

In this case the district court instructed the jury substantially in compliance with the law of South Carolina. After pointing out when punitive damages are available, their purpose, and the standard of proof required, the court turned its attention to the method by which the jury must quantify them. On that subject, the instructions stated in full:

> The amount of punitive damages assessed against any defendant may be such sum as you believe will serve to punish that defendant and deter it and others from like conduct.
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> * * *
>
> Now there was a statement – you must also take into consideration a defendant's ability to pay. I permitted a statement to be read while ago and it was not intentional, it was the statement of the assets. I believe it was read in the record, there were $8,000,000. That was total assets. The net assets in the case, or the net worth and I think the statement was introduced, if not we will introduce it. It reflects that the net worth is somewhere in the neighborhood of a little over a half-million dollars, I believe.
>
> Keep in mind that you should not award, cannot award punitive damages without first awarding actual damages.

No other criterion was given or limitation imposed on the amount, and, as permitted by South Carolina law, the jury was thus left with the discretion to enter an amount of punitive damages as it considered appropriate to punish and deter.

The jury awarded punitive damages of $100,000, which is about 15 times in excess of Dallas Carrier's actual net worth of $6,428. Dallas Carrier's post-trial motions to set aside the verdict, for new trial or for remittitur were all denied, presumably under standards of review supplied by the federal rules, although the record does not reveal the reasons for the district court's denial of the motions. While Dallas Carrier argues that the verdict reveals caprice and passion because of the total absence of any proportionality, it has not contended that the verdict in fact sounds the death knell of the corporation. It has, however, consistently and steadfastly urged that the scheme for awarding punitive damages is unconstitutional.

IV

In contending that due process has not been provided, Dallas Carrier argues that the standard for awarding punitive damages in South Carolina is vague and therefore arbitrary, and that despite its penal characteristics, punitive damages are assessed without procedural safeguards of a type approximating those granted in criminal proceedings. Because South Carolina permits an award of punitive damages for conduct characterized as reckless, willful or wanton, which Dallas Carrier contends is often no more than a heightened degree of negligence, punishment is permitted "without culpability." It argues that the illegal behavior is not adequately defined.

When turning to the method by which the amount of punitive damages are calculated under South Carolina law, Dallas Carrier argues that "there is a complete lack

of intelligible standards for assessing them." It notes that South Carolina law is "alarmingly similar" to that of Vermont and Mississippi which the Supreme Court implied lack adequate standards. *See Haslip*, 111 S. Ct. at 1045 n.10. Finally, Dallas Carrier notes that South Carolina offers no meaningful review of punitive damages awards, either by the trial court or an appellate court. It concludes that South Carolina juries have "unfettered discretion to fashion a punitive damages award and such awards must generally be upheld [by South Carolina appellate courts]."[3]

In part, we agree with Dallas Carrier's argument.

The first principle of due process embraces a rule of law which contains standards that can be known in advance, conformed to, and applied rationally. The doctrine of the supremacy of law is "a doctrine that the sovereign and all its agencies are bound to act upon principles, not according to arbitrary will; are obliged to follow reason instead of being free to follow caprice." R. Pound, *The Spirit of the Common Law* 183 (Beacon Press ed. 1963). Oliver Wendell Holmes, Jr. also touched on this

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[3] Dallas Carrier has also raised an equal protection challenge to the punitive damages awards, on the basis that the South Carolina scheme "preys" on the prejudices of the jury by discriminating against the wealthy, since there are no limiting standards, and against out-of-state corporate defendants. Finally, Dallas Carrier relies on the due process and equal protection clauses of the South Carolina Constitution. Because we hold that the South Carolina scheme applied by a federal court violates the due process clause of the U.S. Constitution, amend. V, we do not reach these other contentions.

notion in his classic *The Common Law* (M.D. Howe ed. 1963).

> [A]ny legal standard must, in theory, be capable of being known. When a man has to pay damages, he is supposed to have broken the law, and he is further supposed to have known what the law was.

Id. at 89.[4]

The constitutional basis for invalidating, as a violation of due process, the delegation without standards of discretion to the jury has been specifically and repeatedly articulated by the Supreme Court. *See* Note, *Constitutional Defenses Against Punitive Damages: Down But Not Out*, 65 Ind. L.J. 141, 150-53 (1989) [hereinafter Note] (discussing cases in which vagueness doctrine was applied to common law and statutory penalties, both civil and criminal).

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[4] The idea that one should be able to guide one's conduct based on settled expectations goes beyond the principle of due process to pervade most aspects of our society. *See, e.g., Official Baseball Rules*, Notes (to the definition of the "strike zone") (1955):

> A batter has the right to expect that the area he is protecting shall be the same from day to day. Necessity for split-second decision by the batter makes it imperative that umpires practice diligently to attain a sameness in their estimation of the strike zone.

But even the predictability of these rules are threatened when their interpretation becomes an act of arbitrary will. *See* G. Will, *Men at Work* 106 (1990) ("Bart Giannatti said people look to games for 'stable artifice,' an island of clear rules, of predictable governance in a world of flux. If that is what fans are looking for, they should not look too closely at the strike zone.").

For example, in 1860, Pennsylvania enacted a statute which provided that when a defendant was acquitted, the jury had to determine whether the county, the prosecutor, or the defendant "shall pay the cost [of the litigation]." *Giaccio*, 382 U.S. at 400-01 (*quoting* Act of March 31, 1860, Pub. L. 427, § 62, Pa. Stat. Ann., Tit. 19, § 1222). Without further guidance by giving criteria as to the circumstances under which any of those parties may bear the costs, the statute provided that the court enter a "sentence" in the amount of costs determined by the jury and commit the person so charged to jail until the costs were paid. *Id.* The Supreme Court held that the statute was invalid in violation of the due process clause "because of vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory impositions of costs." *Id.* at 402. Applying the basic requirement of due process, the Court stated that a statute is unconstitutionally vague and standardless when

> it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. . . . This 1860 Pennsylvania Act contains no standards at all, nor does it place any conditions of any kind upon the jury's power to impose costs . . . .

Id. at 402-03 (citations omitted). Just as the argument is currently made to defend the South Carolina punitive damages scheme, the Commonwealth of Pennsylvania argued that the discretion given to the jury under the Pennsylvania act was checked by post-verdict court review, because the court in their decisions had applied

the statute against the defendants only when the defendants' conduct, "though not unlawful, is 'reprehensible in some respect,' 'improper,' outrageous to 'morality and justice.' " *Id.* at 404. Rejecting that argument, the Supreme Court noted that "the so-called court-created conditions and standards still leave to the jury such broad and unlimited power in imposing costs on acquitted defendants that the jurors must make determinations of the crucial issue upon their own notions of what the law should be instead of what it is." *Id.* at 403. *See also Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.").

Although the principles of due process requiring reasonable certainty in the law were applied in *Giaccio* and *Connally* to the imposition of liability, *see Haslip*, 111 S. Ct. at 1046 n. 12, the principles are equally applicable to sanctions. *Cf. United States v. Batchelder*, 442 U.S. 114 (1979) (availability of two possible sentences did not violate due process); *United States v. Evans*, 333 U.S. 483 (1948); (uncertainty as to nature of offense and applicable penalty rendered judicial interpretation impossible). An argument that prior knowledge of a sanction is less important than knowledge of the conduct to which the sanction applies has some merit. But it does not minimize the need that even the sanction have a rational basis for application. Otherwise the law has no form, predictability or equality in application and becomes the product of the

unique will of the sanction-giver at the time it is imposed. *See generally* Note, 65 Ind. L.J. at 153-55.

Although punitive damages have long been recognized, the early reasons given for their award were uncertain, and only recently when punitive damages have been awarded with increasing frequency, has a significant attack on them mounted.

The first reported punitive damages cases in England were decided in 1763. *Wilkes v. Wood*, 1 Lofft 1, 98 Eng. Rep. 489 (K.B. 1763); *Huckle v. Money*, 2 Wils. 205, 95 Eng. Rep. 768 (K.B. 1763). Punitive damages made their appearance in the United States some 20 to 30 years later. *See, e.g., Genay v. Norris*, 1 S.C.L. (1 Bay) 6 (1784), *Coryell v. Colbaugh*, 1 N.J.L. 90 (1791); *Stout v. Prall*, 1 N.J.L. 93 (1791). A South Carolina jury in *Genay v. Norris* awarded "very exemplary damages" in 1784 to a plaintiff who experienced "excruciating pain" from a drink that the defendant had spiked with cantharides (Spanish fly). Although there was no suggestion that evidence of specific economic damages was presented, the jury nevertheless awarded plaintiff 400 pounds on instructions by the court that the defendant "wrought a very serious injury to the plaintiff, and such a one as entitled him to *very exemplary damages*." 1 S.C.L. (1 Bay) at 7 (emphasis added).

The grounds identified for awarding punitive damages in the earlier cases appear to have been based generally on the inadequacy of the existing standards for awarding compensatory damages. Under one theory, when the breach of a duty caused mental anguish, which was not legally compensable because it is not susceptible

to exact pecuniary value, awards were amplified to allow additional damages. Similarly, when juries awarded excessive damages in cases where the injury was attended by "malice, oppression or gross fraud," the courts were reluctant to interfere with verdicts. Thus, compensation for indignity and suffering, injuries for which compensation was not ordinarily available, was permitted on the ground that the conduct should be exemplified or should be punished. *See* 1 J. Ghiardi & J. Kircher, *Punitive Damages, Law and Practice* § 1.02 (Callaghan & Co. 1985); *see also* American College of Trial Lawyers, *Report on Punitive Damages of the Committee on Special Problems in the Admin. of Justice* 8-9 (Mar. 3, 1989) [hereinafter *Report on Punitive Damages*]. Vestiges of these historical principles remain in the South Carolina law to the extent that punitive damages are still described as a vindication of a private right. *See Harris v. Burnside*, 260 S.C. 190, 199 S.E.2d 65, 68 (1973).

Although the histories of the development of damages for pain and suffering and for punitive damages reveal a common heritage, in more recent times, uncritical acceptance of both has led to a separate recognition of each. Even though the law of compensatory damages now permits awards for mental anguish and suffering, and the expanded array of criminal offenses provides punishment for most of the grounds originally advanced for awarding punitive damages, punitive damages nevertheless continued in the jurisprudence on the basis that they had, for differing reasons, been available earlier.

Any suggestion that punitive damages were readily and rationally applied as the law of the land at the time that the due process clause was incorporated into the

Constitution in 1791 has a weak foundation. *But see Haslip*, 111 S. Ct. at 1055 (Kennedy, J., concurring). Few cases have been identified which discussed the concept of punitive damages at that time and awards of punitive damages were largely an exception to the then-existing jurisprudence of damages.

While the Supreme Court first discussed the propriety of punitive damages in *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851), it was not until recently that members of the Court, on various occasions, acknowledged a concern about whether state schemes for awarding punitive damages lacked adequate standards as required by due process. *See, e.g., Browning-Ferris*, 492 U.S. at 281 (Brennan, J., joined by Marshall, J., concurring); 492 U.S. at 283 (O'Connor, J., Joined by Stevens, J., concurring in part and dissenting in part); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 86-89 (1988) (O'Connor, J., joined by Scalia, J., concurring in part and concurring in the judgment). The watershed decision, however, was handed down this year in *Haslip*.

In *Haslip*, the Supreme Court upheld the Alabama scheme for awarding punitive damages against an attack that awards in Alabama had become the product of "unbridled jury discretion" in violation of the Due Process Clause of the Fourteenth Amendment. Recognizing that unlimited jury discretion in the fixing of punitive damages could result in a constitutionally infirm award, 111 S. Ct. at 1043, the Court concluded that the two-level review of any award by the state trial court and the state appellate court, as established by Alabama law, provided a "sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive

damages" to satisfy the requirements of due process, *Id.* at 1045. The Court noted in particular that review by the Alabama Supreme Court, which takes into account an elaboration of seven relevant factors,[5] "ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." *Id.* In fact, the Court cited cases decided by the Alabama Supreme Court in which the court actually reduced awards based on a review of the factors which include independent facts not before the jury. *See, e.g., United Serv. Auto. Ass'n v. Wade,* 544 So. 2d 906, 917 (Ala.) ("We are of the opinion that the award of $3,500,000 punitive damages is excessive and should be reduced by $1,000,000."), *stay denied,* 492 U.S.

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[5] The seven factors considered by the Alabama Supreme Court are:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

111 S. Ct. at 1045.

930 (1989); *Wilson v. Dukona Corp., N.V.*, 547 So. 2d 70, 74 (Ala. 1989) (the court remitted $21,450 in punitive damages based on facts which were not presented to the jury, even though the court acknowledged that the evidence before the jury "warranted" the jury's making the award). In reaching its decision in *Haslip*, the Court was careful to observe that the Alabama scheme approved there was distinguishable from the schemes in Vermont and in Mississippi "about which Justices expressed concern" in *Browning-Ferris* (Vermont) and in *Bankers Life* (Mississippi). *Haslip* 111 S. Ct. at 1045 n.10. The Court elaborated,

> In those respective schemes [Vermont and Mississippi], an amount awarded would be set aside or modified only if it was "manifestly and grossly excessive," *Pezzano v. Bonneau*, 133 Vt. 88, 91, 329 A.2d 659, 661 (1974), or would be considered excessive when "it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience," *Bankers Life & Casualty Co. v. Crenshaw*, 483 So. 2d 254, 278 (Miss. 1985).

Id.

In *Browning-Ferris*, although the Court never reached the due process issue, the Court observed about the Vermont scheme:

> The parties agree that due process imposes some limits on jury awards of punitive damages, and it is not disputed that a jury award may not be upheld if it was the product of bias or passion, or if it was reached in proceedings lacking the basic elements of fundamental fairness.

492 U.S. at 276. Justice Brennan, joined by Justice Marshall, wrote separately to concur with the understanding that the door was still open as to whether "the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties." *Id.* at 280 (Brennan, J., concurring). Justice O'Connor, joined by Justice Stevens, agreed with Justice Brennan's observation, noting that "[a]wards of punitive damages are skyrocketing." *Id.* at 282 (O'Connor, J., concurring in part and dissenting in part). Similarly, in *Bankers Life*, where again the due process issue was not reached, Justice O'Connor, joined by Justice Scalia, commented on the Mississippi scheme, stating:

> Mississippi law gives juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state. In my view, because of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause.

486 U.S. at 87 (O'Connor, J., concurring in part and concurring in the judgment). For a similar expression about punitive damages by then Associate Justice Rehnquist, see *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting).

Thus while the Supreme Court in *Haslip* did not say as much, the inference is left that the broad discretion given juries under the laws of Vermont and Mississippi is not adequately checked by Court review based on a standard of excessiveness. The same inference is applicable to the South Carolina scheme, where the discretion given to the jury is apparently somewhat broader than that given

in Vermont and Mississippi, and yet the standard for court review similar. In South Carolina, the courts are not required to instruct the jury on a notion of proportionality, and the net worth of the defendant, while relevant, is not a limiting factor.

When a jury is left to its own devices to take property or mete out punishment to whatever extent it feels is best in the course of the process, our sensibilities about that process are offended. It is just this aspect about the South Carolina process that leads us to conclude that the scheme violates the first principle of due process. In circumstances where conduct is found to be reckless, gross or wanton, a jury instructed under South Carolina law is permitted to assess any amount that it feels appropriate to punish or to deter, without any meaningful standard or limitation, and the jury was given that discretion in this case. The court instructed the jury to enter punitive damages in such "sum as you believe" will punish and deter. Because no guidance is required by South Carolina law, a reviewing court could not rationally decide that the amount was excessive without simply substituting its notion of excessiveness for that of the jury. Therefore, any award except the most extraordinary and shocking would have to be left standing because standards of excessiveness are substantially undefined.

If Congress were to enact a statute that provides that "anyone who wantonly or recklessly breaches an existing duty of law becomes subject to a penalty in an amount that the fact finder wishes to enter," consensus would readily be reached to strike it down for being vague and lacking meaningful standards. Similarly, punitive damages awarded under the law of South Carolina are the

product of the subjective feeling of a particular jury in a particular courtroom applying what they think "the law should be instead of what it is." *Giaccio*, 382 U.S. at 403. When we recognize that under a rule of law, principles of law are announced in advance so that the law can be known and the people can conform their conduct accordingly, an award of punitive damages which is entered without a legal standard is unacceptable, regardless of the amount.

The only possible argument for saving the South Carolina punitive damages scheme against an attack for vagueness and lack of standards is the idea that the trial court supervises the jury with the power to grant a new trial when the award is "excessive." The difficulty immediately apparent, however, is that no criteria are provided against which to measure excessiveness. Compensatory damages can be found excessive against evidence offered as to the actual damages caused, and the evidence on the actual damages caused is controlled by principles of causation, admissibility, and reasonableness of actual expenses incurred. When a court reviews an award of punitive damages, it can only test the jury's award against its own notion of excessiveness. Apparently, the Court in *Haslip* concurs in the assessment that a standard of "excessiveness" is not meaningful. *See* 111 S.Ct. at 1045 n.10.

The fact that review by the trial court is in this case conducted under federal law is not ameliorating because any review must be based on a jury verdict measured against the facts and a meaningful standard provided by State law. When no meaningful State law standard or limit is given to the jury on the amount of punitive

damages to be awarded, it can hardly be urged that the jury acted beyond the evidence or not in compliance with the court's instructions. The remaining possibility for review, that a miscarriage of justice resulted, returns to the problem expressed in connection with a standard of excessiveness.

V

Since the argument in this case, the Supreme Court of South Carolina adopted on June 24, 1991, a more elaborate post-trial review to be conducted in the future by state trial courts in an attempt to avoid due process challenges. In *Gamble v. Stevenson*, 406 S.E.2d 350 (1991), the court announced new factors to be considered for post-trial review by South Carolina state courts to bring the practice in line with that approved in *Haslip*. The court stated:

> Hereafter, to ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review and may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) as noted in *Haslip*, "other factors" deemed appropriate.
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> Upon completing its review, dedicated to the postulate that no award be grossly disproportionate to the severity of the offense, the trial court shall set forth its findings on the record.

Id. at 354.

Although it is not made clear in *Gamble* whether the state trial court must conduct a separate post-trial hearing to explore the factual predicate on any relevant fact or, that may be inferred from the imposed requirements that the trial court "conduct a post-trial review" and make findings on the record. Providing standards to follow in the course of the review, the court not only permits consideration of the *Haslip* factors, but directs that no punitive damages award be "grossly disproportionate" to the severity of the conduct. Without the benefit of reported experience with the new procedure, it would appear that state courts in South Carolina will hereafter operate under the same process held constitutional in *Haslip*.

In view of our ruling that grants Dallas Carrier a new trial, we must provide guidance to the district court on retrial, applying South Carolina punitive damages law as altered by *Gamble*.

Because a new trial will be conducted in federal court, the new South Carolina procedures for post-trial review would not be applicable. Rather, the district court must apply Rules 50(b) and 59, which permit the court to interfere with a verdict, under Rule 50, only where no substantial evidence is offered on which the jury can base its award, *Defender Indus.*, 938 F.2d at 505, and, under Rule 59, only where the verdict is "against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice." *Id.* at 507 (*quoting Aetna Casualty & Sur. Co. v. Yeatts*, 122 F.2d 350, 352 (4th Cir. 1941)). In addition, any review by the district court of an award of punitive damages also

remains subject to the limitations of the Seventh Amendment. *See id.* at 507 ("we hold that the seventh amendment guarantees the right to a jury determination of the amount of punitive damages").

The Seventh Amendment directs that facts decided by a jury may not be "re-examined" by a federal court, other than "according to rules of the common law." The common law referred to in the Amendment is the common law of England as it existed in 1791. *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935). *See also United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750) (Story, Circuit Justice) ("Beyond all question, the common law here alluded to [in the Seventh Amendment] is not the common law of any individual state, . . . but it is the common law of England, the grand reservoir of all our jurisprudence."). The Seventh Amendment was adopted in 1791 after a fear had developed during the debates over ratification of the Constitution whether the right to jury trial in civil cases was adequately preserved by the original Constitution. By the express guarantee of the Seventh Amendment, the right of jury trial in civil cases was thus secured "in the fullest latitude of the common law" and placed "upon the high ground of constitutional right." J. Story, *Commentaries on the Constitution of the United States* § 919 at 654 (Rotunda & Nowak ed. 1987).

The common law in 1791 permitted a court to review jury verdict by two methods – by sustaining a demurrer to the evidence and by ordering a new trial. A demurrer to the evidence was available when no evidence was offered to prove the particular fact. As Chief Justice Marshall explained the practice,

> The party demurring admits the truth of the testimony to which he demurs, and also those conclusions of fact which a jury may fairly draw from that testimony. Forced and violent inferences he does not admit; but the testimony is to be taken most strongly against him, and such conclusions as a jury might justifiably draw, the court ought to draw.

Pawling v. United States, 8 U.S. (4 Cranch) 219, 221-22 (1808). The court, however, could never remove from the jury the function of weighing evidence and determining the credibility of witnesses. Because a demurrer to the evidence required the moving party to admit the evidence against him and withdraw the case from the jury, the high risk to the moving party chilled its use. *See Suydam v. Williamson*, 61 U.S. (20 Howard) 427, 436 (1857). The motion for a directed verdict was thereafter adopted as a benign modification. *See Parks v. Ross*, 52 U.S. (11 Howard) 362, 373 (1850). The directed verdict practice permitted the moving party to admit the truth of plaintiff's facts for purposes of the motion only, permitting him to continue his defense if the motion was denied. The standard under either the demurrer or the directed verdict motion, however, remained the same – whether there was evidence from which the jury could find the fact. No authority from any time has been found that the court can substitute its judgment for that of the jury on a matter properly committed to it.

That is not to say, however, that the court was without authority to correct error when the jury failed to follow instructions given to it, or was motivated extraneously by evidence outside the record or otherwise, or simply produced a manifestly unjust result. Although the

court could not substitute its finding for that of the jury, it could remove the case from the jury that was impaneled and recommit it to a new jury by ordering a new trial. The long-standing practice was in essence a veto right of the court over the jury's process, which while not permitting the court to enter its own judgment, permitted it to reject that of the jury when it strayed. As Justice Story explained the court's role,

> It is indeed an exercise of discretion full of delicacy and difficulty. But if it should clearly appear that the jury have committed a gross error, or have acted from improper motives, or have given damages excessive in relation to the person or the injury, it is as much the duty of the court to interfere, to prevent the wrong, as in any other case.

Blunt v. Little, 3 F.Cas. 760, 761-62 (C.C.D. Mass. 1822) (No. 1,578) (Story, Circuit Justice). This language was cited with approval by the Supreme Court in *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69, 73 (1889), and remains a standard for granting a new trial in the Fourth Circuit. We have stated:

> The motion to set aside the verdict and grant a new trial was a matter of federal procedure, governed by Rule of Civil Procedure 59 and not subject in any way to the rules of state practice. On such a motion it is the duty of the judge to set aside the verdict and grant a new trial, if he is of opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. The exercise

> of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right.

Aetna Casualty, 122 F.2d at 352-53. And this standard was confirmed recently in *Defender Indus.*, 938 F.2d at 507.

The right to jury trial secured by the Seventh Amendment thus reserves the weighing of evidence and the finding of facts exclusively to the jury. When a jury has not been presented with substantial evidence to make a finding, the finding can be reversed by the trial court. When the jury commits error in the application of the law, relies on facts not before it or bases its decision on improper motives, or reaches a result that is against the clear weight of the evidence or is manifestly unjust, the court may withdraw the case from that jury and order a trial before another jury. In either case, however, the court cannot, consistent with the Seventh Amendment, evaluate a jury's verdict based on evidence that the jury was not permitted to consider at trial or on a legal standard not given to the jury. These rights secured by the Seventh Amendment form the basis of current jurisprudence developed around Rules 50(b) and 59, Fed. R. Civ. P.

A *Haslip*-type post-trial review, insofar as it is a *quasi* de novo review by which the court reviews facts, some of which may not have been presented to the jury, would be inconsistent with the restrictions of the Seventh Amendment. When a factual issue is committed to the jury, as punitive damages are under federal law, *see Defender Indus.*, 938 F.2d at 507, the court cannot substitute its judgment for that of the jury. Rather it can only grant a

new trial, and then only under the standards permitted by federal law. *See Browning-Ferris*, 492 U.S. at 279.

VI

Our holding that the South Carolina scheme for awarding punitive damages applied by a federal court denied the defendant of due process leaves the question of whether a new trial can be ordered. Although state court juries in South Carolina will be permitted hereafter to award punitive damages under a scheme similar to that held constitutional in *Haslip*, a federal court cannot apply the *Gamble* post-verdict review process, leading to the anomalous result that a decision on a claim for punitive damages could be significantly different depending on whether the case as tried in a federal court.

Although federal procedures are not intended to have substantive effect, *see* 28 U.S.C. § 2072(b), no principle guarantees that a case tried under federal procedure will reach the same outcome that would be reached had the same case been tried under a state procedure. In *Hanna v. Plumer*, 380 U.S. 460, 466-67 (1965), the Supreme Court noted that an " '[o]utcome-determination' analysis was never intended to serve as a talisman." Rather, "choices between state and federal law are to be made not by application of any automatic, 'litmus paper' criterion, but rather by reference to the policies underlying the *Erie* rule." *Id.* at 467. The Court concluded that these policies – the discouragement of forum-shopping and the avoidance of inequitable administration of the laws – were not offended by the application of the federal rule for service of process, even through the outcome of litigation could

differ if the state rule for service of process were applied at that stage of the proceedings. *Id.* at 466-69. The difference in the state and federal service of process rules would be "of scant, if any, relevance to the choice of a forum" in the first instance. *Id.* at 469.

Heeding the analysis of *Hanna*, we noted in *Wratchford v. S. J. Groves & Sons Co.*, 405 F.2d 1061, 1064 (4th Cir. 1969), that the *Erie* doctrine cannot be applied in terms of an "outcome-determinative" test or merely by asking whether a rule is "substantive" or "procedural." We added:

> In a diversity case, state law defining and limiting [the] primary rights and obligations [of the parties] must be applied under the *Erie* doctrine, enabling members of society prudently to plan and conduct their affairs, whether their conduct will later be called into question in a state or a federal court.

Id. at 1065. With this guideline, we determined that the question of how much evidence is sufficient to send a case to the jury in a diversity case should be answered by application of federal and not state law. *Id.* at 1065-66.

In this case our review of South Carolina law reveals that the review mandated for state judges at the time the district court conducted its review in this case was no more elaborate than that permitted by federal Rules 50 and 59. Accordingly, any distinction would not be of such substance as to encourage forum-shopping and cause a discriminate application of the South Carolina law of punitive damages. However, in view of the decision by the Supreme Court of South Carolina in *Gamble*, issued on June 24, 1991, the review to be conducted *"hereafter"* by

trial courts in South Carolina will parrot the review conducted by the Alabama Supreme Court as described in *Haslip*, and the potential for a different result becomes sufficiently significant so that fora might be selected on that basis. Although we do not yield to an "outcome-determination" test in this case, we believe that a proper pre-verdict application of South Carolina law hereafter in the federal courts can yield a scheme consistent with that adopted in *Gamble*.

The decision in *Gamble* makes no mention about any change in the instructions to be given to the jury. This is a particularly meaningful omission for federal courts which review verdicts under federal review standards. We believe that the standards adopted by the South Carolina Supreme Court in *Gamble* are nevertheless intended to be the basis for all awards of punitive damages in South Carolina.

Accordingly, until stated otherwise by the South Carolina Supreme Court, we direct that on remand South Carolina's new standard for post-trial review be incorporated by the district court in its instructions to the jury. If the plaintiff demonstrates an entitlement to punitive damages, we direct that the district court's instructions on the amount of punitive damages that may be awarded include instruction on four aspects, which are derived from *Gamble* and *Haslip*:

> (1) *Relationship to harm caused:* Any penalty imposed should take into account the reprehensibility of the conduct, the harm caused, the defendant's awareness of the conduct's wrongfulness, the duration of the conduct, and any concealment. Thus any penalty imposed should

bear a relationship to the nature and extent of the conduct and the harm caused, including the compensatory damage award made by the jury.

(2) *Other penalties for the conduct:* Any penalty imposed should take into account as a mitigating factor any other penalty that may have been imposed or which may be imposed for the conduct involved, including any criminal or civil penalty or any other punitive damages award arising out of the same conduct.

(3) *Improper profits and plaintiff's costs:* The amount of any penalty may focus on depriving the defendant of profits derived from the improper conduct and on awarding the costs to the plaintiff of prosecuting the claim.

(4) *Limitation based on ability to pay:* Any penalty must be limited to punishment and thus may not effect economic bankruptcy. To this end, the ability of the defendant to pay any punitive award entered should be considered.

Recognizing that our interim directions may be applied beyond this case, we observe that, when it is determined that the evidence relevant to the appropriate amount of punitive damages will be prejudicial to the jury's consideration of liability or compensatory damages, bifurcation of the trial under Fed. R. Civ. P. 42(b) remains an available solution. *See Report on Punitive Damages* at 18-19; Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 300-02 (1983). Whenever the district court orders a bifurcated trial, the jury should be required, in the first phase, to determine whether punitive damages are to be awarded, and only if its verdict so determines, should it

be presented in the second phase with the evidence relevant to the factors for finding the appropriate amount. In this case, however, where the new trial is limited to the issue of punitive damages, a bifurcation would probably not become necessary.

VII

Dallas Carrier's other contentions of error are that (1) the district court erred in permitting a lay witness to give an opinion about the adequacy of emergency flashers, (2) the evidence was insufficient to support the verdicts, and (3) the district court improperly instructed the jury. We reject each of them.

A

At trial the Mattisons offered and the court admitted over objection the testimony of Ms. Dina Busha that the emergency flashers on the tractor trailer did not provide an adequate warning "[u]nder the conditions of the weather at the time." Dallas Carrier contends that it was reversible error to admit this testimony.

Rule 701, Fed. R. Evid., permits a lay witness to give an opinion if it (a) is based on the observation of the witness and (b) explains the witness' testimony or is probative of a fact in issue. If the requirements of the rule are satisfied, the evidence should usually be admitted. *See United States v. Gould*, 741 F.2d 45, 51 n.6 (4th Cir. 1984). In any event, we review the ruling of the district court only for an abuse of discretion. *United States v. Robinson*, 804 F.2d 280, 282 (4th Cir. 1986).

Ms. Busha's testimony arguably satisfies both prongs of Fed. R. Evid. 701. She witnessed the accident and formed an opinion about the truck's flashers as she observed them under the weather conditions on Secondary Road 107 at the time. Her testimony explained her observations on the effectiveness of the tractor trailer's emergency flashers to provide a warning. While the question is a close call and we must be always mindful to guard against lay witness testimony when it involves "meaningless assertions which amount to little more than choosing up sides," Fed. R. Evid. 701, Advisory Committee Note, we cannot say that the district court abused its discretion in the circumstances of this case in admitting Ms. Busha's lay opinion testimony.

B

Dallas Carrier contends that the evidence did not support the jury's finding of liability and the amount of compensatory damages found. In particular it contends that as a matter of law Mr. Mattison was driving too fast for conditions. This, however, is peculiarly a factual question for resolution by the jury. The evidence that he was going 20 m.p.h. at the time cannot as a matter of law be the basis for withdrawing the question from the jury. Moreover, the jury could have found from the evidence that Dallas Carrier's driver was reckless, a basis of liability for which Mr. Mattison alleged contributory negligence would not be a defense. *See, e.g., Dudley Trucking Co. v. Hollingsworth,* 243 S.C. 439, 134 S.E.2d 399, 402 (1964) ("[C]ontributory negligence is not a defense when the injury complained of is shown to have been wilfully or recklessly done.").

Similarly, the awards of $100,000 in compensatory damages for Mr. Mattison and $25,000 for Mrs. Mattison were supported by the evidence. Mr. Mattison incurred $28,903.26 in medical expenses, and there was ample evidence of pain and an aggravated disability caused by the accident. Mrs. Mattison incurred medical expenses of $12,805.43, and although there was conflicting evidence about whether a large portion of those expenses was incurred to treat an accident-related injury, the jury could reasonably have believed testimony that suggested that all of her medical expenses were related to the accident. As was the case with Mr. Mattison, there was also ample evidence of pain and suffering experienced by Mrs. Mattison.

C

Finally, Dallas Carrier charges error with two aspects of the jury instructions.

First, Dallas Carrier contends that the district court erred in refusing to instruct the jury specifically that Mr. Mattison had a duty to reduce his driving speed in adverse weather conditions. In view of the instruction actually given, we do not find that the jury was not adequately and properly instructed on the point.[8]

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[8] The court instructed the jury that:

A plaintiff may be contributorily negligent if he is forgetful of a known danger, or if he is inattentive to a known danger.

In this light, I charge you that no person shall operate a vehicle on a highway *at a speed that is greater than is reasonable and prudent under the circumstances* and conditions existing, and having due regard for the actual and potential hazards then existing. (Emphasis added.)

The second aspect of the instructions with which Dallas Carrier takes issue is more problematic. In instructing the jury on Dallas Carrier's net worth as relevant to punitive damages, the district court informed the jury that the amount was "in the neighborhood of a little over a half-million dollars." The correct figure for 1989, the last year for which an amount was available, was $6,428. The half-million-dollar figure was applicable for the year before.

Although the jury was given the actual financial records from which it could obtain the correct figure, the court's statement was in error. It appears, however, that Dallas Carrier failed to preserve an objection. During the trial the jury had been informed by the Mattisons that Dallas Carrier had assets (gross, not net) of $8 million. When Dallas Carrier objected to the comment as misleading, the district court attempted to correct the error by telling the jury in the instructions that the net worth figure was actually $500,000. After the instructions were given, the following dialogue took place:

> THE COURT: All right. What about that statement, put that in evidence [the actual financial statements], since I said it would be for them in evidence.
>
> COUNSEL FOR DALLAS CARRIER [MR. LYALL]: Yes, sir, I don't object to it being in evidence, it is 1989 net worth was only $6,000.
>
> THE COURT: What is the other one?
>
> MR. LYALL: In 1988 it was half-million dollars, you were correct, 1988.
>
> THE COURT: Okay. Is everybody happy with what I said?

> COUNSEL FOR THE MATTISONS [MR. CODE]: We [are] not displeased, Your Honor.

Counsel for Dallas Carrier then went on to note three objections, but he did not again refer to the net worth issue.

In order to preserve an objection to the instructions to the jury, a party is required to point out specifically the nature of the objection. *See* Fed. R. Civ. P. 51 ("No party may assign as error the giving or the failure to give an instruction unless that party objects thereto . . . stating distinctly the matter objected to and the grounds of the objection.").

In this case had Dallas Carrier made an objection, the court could easily have directed the jury to the actual financial record in evidence and read the $6,000-net worth figure from it, thereby totally correcting the misstatement. Because no objection was preserved, Dallas Carrier permitted the misstatement to stand. It cannot now on appeal advance the issue for the first time as a ground for reversal.

For the reasons given, we affirm the judgment insofar as compensatory damages are awarded, and reverse the award of punitive damages for a new trial.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS

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(4)

No. 91-465

FILED
OCT 23 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

ACADEMY LIFE INSURANCE COMPANY,

Petitioner,

v.

GEORGE W. GUILL,

Respondent.

ACADEMY LIFE INSURANCE COMPANY,

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v.

NORRIS O. WHITLEY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Respondents, in their opposing brief in this matter, appear to assume that the statement in the opinion of the court below that "[t]he Supreme Court has recently foreclosed Academy's due process claim" represents a conclusion by the Court of Appeals based upon consideration and application of the standards constraining discretion described in *Pacific Mutual Life Ins. Co. v. Haslip,*

499 U.S. ___, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). However, the language of the opinion does not reflect such consideration or application by the Court of Appeals of the necessary standards. Furthermore, under the thorough analysis in the more recent decision of *Mattison v. Dallas Carrier Corp.*, ___ F.2d ___, 1991 WL 204314 (4th Cir. 1991), discussed in the Supplemental Brief of Petitioner filed herein, the required standards cannot be initially applied in these diversity cases on post-trial or appellate review. They must be considered and applied by the jury under appropriate instructions. Hence under any view of the matter, the decision of the court below should not be permitted to stand.

There is no merit in respondents' contentions regarding the timeliness of petitioner's due process objection. When these cases were tried, there was no decision of this Court establishing or delineating objective and meaningful standards for constraining jury discretion in assessing the amount of punitive damages so as to warrant application of the doctrine of waiv of a known constitutional right. See *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). Moreover, as this Court stated in *Hormel v. Helvering*, 312 U.S. 552, 557, 61 S.Ct. 719, 721, 85 L.Ed. 1037, 1041 (1941):

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. . . . "

Unlike *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989), where this Court declined to determine the due process issue "[b]ecause petitioners failed to raise their due process argument before either the District Court or the

Court of Appeals, and made no mention of it in their Petition for Certiorari in [the Supreme Court]" (492 U.S. at 277), petitioner in the instant cases raised the due process argument under the Fifth and Fourteenth Amendments to the United States Constitution in a post-trial reply brief to the district court, in its brief on appeal to the Court of Appeals,[1] and also in its Petition for Writ of Certiorari in this Court in light of the *Haslip* case.

The questions involved concern issues of fundamental constitutional rights. The Court of Appeals' error in the treatment of the due process issue with respect to the punitive damages awards is evident. No further development of the record is needed and petitioner submits that the error should be corrected by this Court.

Respectfully submitted,

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[1] Respondents' assertion that there was an "election" by petitioner "to forego argument on the point in the Fourth Circuit" (Respondents' Brief in Opposition, p. 4) is without justification. Time constraints do not permit all issues on appeal to be developed in oral argument. The due process argument was fully briefed in the Brief of Appellants.